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In The
Supreme Court of the United States
October Term, 1989

WALTER A. WALKER, JR.,

Petitioner,

v.

CONSUMERS POWER COMPANY, A
MICHIGAN CORPORATION,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI AND REQUEST FOR
SUMMARY REVERSAL**

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**COUNTER-STATEMENT OF QUESTION
PRESENTED FOR REVIEW**

Did the affirmance by the Sixth Circuit Court of Appeals of a decision of the District Court made after prior rulings by this Court and the Sixth Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

DESIGNATION OF CORPORATE RELATIONSHIPS

Consumers Power Company, filing this Brief in Opposition to Petition for Writ of Certiorari and Request for Summary Reversal as Respondent in this proceeding, states pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States that:

This is its original Designation of Corporate Relationships.

The CMS Energy Corporation is the parent of Consumers Power Company.

Consumers Power Company does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries). CMS Energy Corporation does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

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OPINIONS BELOW

The unpublished opinion filed by the Sixth Circuit Court of Appeals on February 23, 1990 is included in Petitioner's petition for writ of certiorari as Appendix A.

The District Court's Order Dismissing Plaintiff's State Law Claim (R 277), filed on October 6, 1988, is included in this brief as Appendix A.

The District Court's Order Granting Defendant's Motion to Dismiss Plaintiff's State Law Claim (R 276), filed on September 6, 1988, is included in this brief as Appendix B.

The Sixth Circuit's original decision in this matter has been published as *Walker v. Consumers Power Co.*, 824 F.2d 499 (6th Cir. 1987), *cert denied* 484 U.S. 1011, 108 S.Ct. 711, 98 L.Ed.2d 661 (1988), *reh'g. denied* 485 U.S. 930, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988).

STATEMENT OF THE CASE

On August 12, 1980, Petitioner Walter A. Walker filed a complaint against his former employer, Respondent Consumers Power Company, in the District Court for the Eastern District of Michigan. Petitioner began employment with the Respondent in Jackson, Michigan, as an Associate Engineer in the Nuclear-Fuel Supply Department on March 15, 1971. He was discharged from his job as a Senior Engineer in the Nuclear-Fuel Supply Department on March 19, 1980.

On or about July 21, 1981, Petitioner filed a first amended complaint. The first amended complaint contained five counts, including violation of 42 U.S.C. §1981, breach of contract, fraudulent misrepresentation, impairment of economic opportunities, and libel and slander.

The District Court unquestionably had jurisdiction over the claim brought pursuant to 42 U.S.C. §1981. The other claims, however, were state law claims. On or about August 13, 1982, Respondent filed a motion to dismiss and/or for summary judgment. Among other things, Respondent argued that the District Court should decline to exercise pendent jurisdiction over Petitioner's state law claims. The District Court, by an order dated September 24, 1982, denied the motion and retained jurisdiction over the pendent claims.

The libel and slander claim was dismissed by stipulation of the parties on August 31, 1982. The impairment of economic opportunities claim was dismissed by a District Court order dated September 24, 1982.

In May of 1984, the parties proceeded to trial before the Honorable Charles Joiner on only three of the counts stated in the first amended complaint. In Count I, Plaintiff attempted to assert a racial discrimination claim under 42 U.S.C. §1981. In Count II, Petitioner asserted a "breach of contract" claim. Petitioner claimed in Count II that Respondent discharged him without just cause contrary to his contractual rights allegedly arising from *Tous-saint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980). In Count III, Petitioner asserted a cause of action for fraudulent misrepresentation.

At the time of trial, the District Court granted Respondent's motion for directed verdict on Petitioner's claim for fraudulent misrepresentation. Thus, the case went to the jury only on the §1981 claim and the breach of contract claim.

On June 6, 1984, the jury returned a verdict of no cause for action in favor of Respondent on Petitioner's §1981 claim, but returned a verdict of \$1,194,600 in favor of Petitioner under the breach of contract claim.

On June 22, 1984, Respondent filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial, or Remittitur. The District Court denied Respondent's motion on August 7, 1984.

Respondent appealed the judgment on the breach of contract claim to the Sixth Circuit Court of Appeals. Petitioner did not cross-appeal the District Court's dismissal of his fraudulent misrepresentation claim or the jury's finding of no cause for action on the §1981 claim.

In a published opinion, the Sixth Circuit Court of Appeals reversed the judgment entered by the District Court and remanded for a new trial limited to the issue of whether Respondent breached an employment contract with Petitioner by discharging him without just cause. *Walker v. Consumers Power Co.*, 824 F.2d 499 (6th Cir. 1987). The Court of Appeals concluded that it was error for the District Court to submit to the jury the issue of an alleged "failure to promote" and to permit an award and computation of damages based upon the breach of any such promise. *Walker*, 824 F.2d at 502.

In November, 1987, Petitioner filed a petition for writ of certiorari with this Court, which was denied on January 11, 1988. *Walker v. Consumers Power Co.*, 484 U.S. 1011, 108 S.Ct. 711, 98 L.Ed.2d 661 (1988). Petitioner's petition for rehearing was denied by this Court on February 29, 1988. *Walker v. Consumers Power Co.*, 485 U.S. 930, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988).

After remand to the Eastern District of Michigan, a pretrial conference was held on June 30, 1988. With the retirement of Judge Joiner, the case was reassigned to the Honorable George La Plata. At the pretrial conference, both by written pleading and oral discussion, Petitioner requested that the issue of the District Court's continuing jurisdiction be decided. Therefore, on July 13, 1988, Respondent filed a motion to dismiss Petitioner's state claim. Respondent argued that since the only remaining claim was a state law breach of contract claim, the District Court should exercise its discretion and dismiss the state claim in order to allow the parties to litigate the claim in state court.

On September 6, 1988, the District Court issued its Order Granting Defendant's Motion to Dismiss Plaintiff's State Law Claim. (See Appendix B). To assure that Petitioner would be able to avail himself of the state forum, the District Court granted Respondent's motion without prejudice. The Court further ordered Respondent to file a record of waiver of any applicable statute of limitations defenses in the appropriate state court. To give Petitioner adequate time to file his claim in the appropriate state forum, the District Court did not enter an order of dismissal until October 6, 1988. (See Appendix A).

On October 3, 1988, Petitioner appealed the District Court's September 6, 1988 order to the Sixth Circuit Court of Appeals. The only issue on appeal was whether the District Court had properly exercised its discretion in dismissing Petitioner's only remaining claim, which was purely a question of state law. On February 23, 1990, the Sixth Circuit Court of Appeals filed an unpublished opinion affirming the District Court's dismissal of Petitioner's case.

On May 24, 1990, Petitioner filed a petition for writ of certiorari with this Court. Respondent now files this brief in opposition to the petition and requests this Court to deny the relief sought by Petitioner.

SUMMARY OF THE ARGUMENT

Petitioner's only remaining claim against Respondent is a state law breach of contract claim. Thus, the only issue properly before this Court is whether the District Court properly exercised its discretion in ruling that Petitioner's state law claim should be resolved by the Michigan state courts. Respondent submits that the District Court properly exercised its discretion by dismissing Petitioner's only remaining claim, which involves solely a question of state law.

Furthermore, Petitioner has failed to provide a special and important reason why this Court should exercise its judicial discretion and grant certiorari. In affirming the District Court's dismissal of Petitioner's state claim, the Sixth Circuit Court of Appeals has not so far departed

from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Thus, Respondent respectfully requests this Court to deny Petitioner's petition for a writ of certiorari.

ARGUMENT

I. SINCE PETITIONER'S ONLY REMAINING CLAIM IS A STATE LAW CLAIM, THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING PETITIONER'S CASE FROM THE FEDERAL COURTS.

The only remaining issue in this case is whether Respondent breached an employment contract by discharging Petitioner without just cause. This is purely a question of Michigan law under *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980). Both this Court and the Sixth Circuit have articulated strong policies in favor of allowing state claims to be tried in state court. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-727, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), this Court stated as follows:

It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims even though bound to apply state law to them. [Citation omitted]. Needless decisions of state law should be avoided both as a matter of comity, and to promote justice between the parties, by procuring

for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, in terms of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state law claims may be dismissed without prejudice and left for resolution to state tribunals.

The Sixth Circuit has interpreted *Gibbs* as leaving the district court little or no discretion to retain jurisdiction over a pendent state claim once the federal claim has been dismissed. *Service, Hospital, Nursing Home & Public Employees Union, Local No. 47 v. Commercial Property Services, Inc.*, 755 F.2d 499, 506 n. 1 (6th Cir. 1985), cert. denied 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1985); *Kurz v. State of Michigan*, 548 F.2d 172, 175 (6th Cir. 1977), cert. denied 434 U.S. 972, 98 S.Ct. 526, 54 L.Ed.2d 462 (1977); *Gibson v. First Federal Savings & Loan Ass'n. of Detroit*, 504 F.2d 826, 830-831 (6th Cir. 1974).

Both the District Court and the Sixth Circuit correctly held under *Gibbs* that Petitioner's state law claim should be heard in the Michigan state courts even though this case has already been tried in federal court. The Sixth Circuit has ordered a new trial. The only question now is whether the case should be retried in the federal district court or the state circuit court. The case will have to be retried regardless of which court conducts the trial. Thus, this case is analogous to the Sixth Circuit cases cited above, where the federal claims were dismissed prior to trial.

At this point, there is no judicial economy argument favoring retrial in federal court. This is especially true since the original trial judge, Judge Joiner, has retired and would not preside at a retrial in the District Court. Thus, any retrial in this matter would require a new judge to become familiar with the case.

Furthermore, the Sixth Circuit correctly held at pages 6-8 of its unpublished opinion that Petitioner's claims of "inconvenience" do not require a retrial in the federal court system. Although Petitioner claims that trying this case in the state forum would be personally inconvenient, he cannot show that trying this case in the state courts would impede his ability to receive a fair trial. Thus, the District Court and the Sixth Circuit correctly held under *Gibbs* that Petitioner is not entitled to a retrial of this case in federal court.

When the District Court originally tried this case, it could justify retaining jurisdiction over the pendent state claims because Petitioner had asserted a cause of action under 42 U.S.C. §1981. Petitioner's §1981 claim no longer exists. If the District Court presides over the retrial of this case, it would be trying a pure state law claim. This is precisely the type of situation which this Court in *Gibbs* sought to discourage. 383 U.S. at 726.

Petitioner will not be left without a remedy if this case is not retried in the federal court system. He would merely be required to pursue his state claim in the state courts. In its September 6, 1988 order, the District Court dismissed Petitioner's case "without prejudice" and ordered Respondent to file a record of waiver of any

applicable statute of limitations defenses in the state circuit court. Respondent is willing to comply with this requirement.

For the reasons stated above, Respondent respectfully requests this Court to deny Petitioner's petition for writ of certiorari and request for summary reversal.

II. PETITIONER HAS FAILED TO PROVIDE THIS COURT WITH ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING HIS PETITION FOR WRIT OF CERTIORARI.

Petitioner states at page 8 of his petition that this Court should grant certiorari in this matter pursuant to Rule 10.1(a) of the Rules of the Supreme Court of the United States because the Sixth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." This is the only reason provided by Petitioner for this Court to exercise its discretion to grant his petition for certiorari.

Although it is difficult to decipher the precise reasons behind Petitioner's claim that the Sixth Circuit has departed from the accepted and usual course of judicial proceedings, it appears that this claim is based on the Sixth Circuit's decision not to publish its February 23, 1990 ruling. (See petition for writ of certiorari, pp. 8-13). The Sixth Circuit's decision not to publish its opinion was not a departure from the accepted and usual course of judicial proceedings, but was made in conformance with

Rule 24 of the Rules of the United States Court of Appeals for the Sixth Circuit. Furthermore, Petitioner has failed to demonstrate any prejudice arising from the Sixth Circuit's after-the-fact decision not to publish its opinion. The result is the same whether or not the decision is published. Thus, the Sixth Circuit's failure to publish its opinion is not an adequate reason for this Court to grant certiorari.

The remainder of Petitioner's brief is merely a restatement of the arguments he previously has made to the Sixth Circuit and to this Court. That is, Petitioner claims that this case should not have been reversed and remanded by the Sixth Circuit because of an erroneous jury instruction¹ and that every court that has ruled against him in this matter has been motivated by racial animus. This Court has already denied certiorari on these issues. *Walker v. Consumers Power Co.*, 484 U.S. 1011, 108 S.Ct. 711, 98 L.Ed.2d 661 (1988), *reh'g. denied* 485 U.S. 930, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988). These issues are not properly before this Court.

Petitioner has failed to assert any special and important reasons under Rule 10.1(a) of the Rules of the Supreme Court of the United States for granting certiorari. Therefore, Respondent Consumers Power Company respectfully requests this Court to deny Petitioner's petition for writ of certiorari and request for summary reversal.

¹ Ironically, Petitioner admits at page 30 of his brief that the jury instruction which required the reversal of the jury verdict was, in fact, erroneous.

CONCLUSION

For the reasons stated above, Respondent Consumers Power Company respectfully requests this Court to deny Petitioner's petition for writ of certiorari and request for summary reversal and to grant all other just and proper relief.

FOSTER, SWIFT, COLLINS &
SMITH, P.C.
*Attorneys for Respondent,
Consumers Power Company*

Dated: 6/13/90

By: /s/ George M. Brookover
George M. Brookover
(P25391)

APPENDIX A

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

WALTER A. WALKER, JR.,

Plaintiff,

**C.A. No. 80-
CV-60037-AA**

vs.

CONSUMERS POWER COMPANY,

**HON. GEORGE
La PLATA**

Defendant.

**ORDER DISMISSING PLAINTIFF'S
STATE LAW CLAIM**

Pursuant to this Court's Order dated September 6, 1988, Plaintiff's action is hereby DISMISSED without prejudice.

/s/ George La Plata
GEORGE La PLATA
U. S. District Judge

October 6, 1988
Ann Arbor, MI

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WALTER A. WALKER, JR.,

Plaintiff,

C.A. No. 80-
CV-60037-AA

vs.

CONSUMERS POWER COMPANY,

HON. GEORGE
La PLATA

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS PLAINTIFF'S STATE LAW CLAIM**

Plaintiff, Walter A. Walker, filed this action against Defendant, Consumers Power Company, alleging that he was discharged from his job as a senior engineer in the Nuclear Fuel Supply Department without just cause contrary to his contractual rights as recognized in *Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W.2d 880 (1980). The case finally proceeded to trial in federal district court on three separate counts. Count 1 charged the Defendant with having discriminated against Plaintiff based on race in violation of 42 U.S.C. §1981 by depriving him of the full and equal benefit of all laws and proceedings as enjoyed by white citizens. Counts 2 and 3 alleged pendent claims under Michigan law; Count 2 alleged that Defendant breached its employment contract with Plaintiff and Count 3 alleged a tort claim for fraudulent misrepresentation. Prior to trial, the court granted a motion

for a directed verdict on Count 3 for fraudulent misrepresentation. The jury returned a verdict in favor of Defendant on Count 1, the claim under 42 U.S.C. §1981. Plaintiff was granted a verdict in the amount of \$1,194,600.00 on Count 2, the breach of contract claim. The Defendant appealed the verdict on the breach of contract claim. No cross-appeal was taken by the Plaintiff with respect to Counts 1 or 3. On appeal, the Sixth Circuit Court of Appeals reversed the judgment entered by the district court and remanded for a new trial, limited to the issue of whether Defendant breached an employment contract with Plaintiff by discharging him without just cause. *Walker v. Consumers Power Co.*, 824 F.2d 499 (6th Cir. 1987), cert. denied 108 S.Ct. 711 (1988). The case is currently before this Court on Defendant's Motion to Dismiss Plaintiff's State Claim.

The only remaining issue to be tried in this case is whether under Michigan law Defendant breached an employment contract with Plaintiff. *United Mine Workers v. Gibbs*, 86 S.Ct. 1130 (1966) establishes that although a federal court may have the power to decide state law claims, that power should not be exercised in every case in which it exists. In *Gibbs* the Supreme Court stated:

It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed

reading of applicable law. Gibbs at 1139 (footnotes and citations omitted).

In the present case the breach of employment contract issue must be retried whether it is retried in state or federal court. Absent considerations of judicial economy, convenience and fairness to the litigants, the state forum should decide issues of state law.

This Court's dismissal of the claim should not pose a problem of the Plaintiff's claim being barred by the Michigan statute of limitations. See M.C.L.A. Section 600.5856; *Ralph Shrader, Inc. v. Ecclestone Chemical Company*, 177 N.W.2d 241 (1970). To assure that Plaintiff may avail itself of the local forum, this Court GRANTS Defendant's Motion to Dismiss Plaintiff's State Claim without prejudice; however, the Court shall not enter an Order of Dismissal until thirty days from the date of this Order so that the Plaintiff shall have adequate time to file his claim in the appropriate state forum; further, if the statute of limitations has run on Plaintiff's breach of contract claim, Defendant is ORDERED to file a record of waiver of any applicable statute of limitations defenses in the appropriate state court.

/s/ George La Plata
GEORGE LA PLATA
U. S. District Judge

September 6, 1988
Ann Arbor, MI

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF
MICHIGAN

BY /s/
DEPUTY CLERK
